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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF INFORMATION RE USE OF FORCE (#697)**
AMMON BUNDY, et al.,	
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby responds to Defendants' Motion to Compel Production of Information Regarding Law Enforcement's Use and Display of Force (ECF No. 697) and the supporting Memorandum (ECF No. 698), filed by defendant Ritzheimer on behalf of all defendants.

I. Government's Position

The defense seeks to compel production of eighteen broadly defined categories of information related to the law enforcement response to defendants' armed takeover and occupation of the Malheur National Wildlife Refuge (MNWR). Defendants contend that they are entitled to production of the information under Rule 16 and the U.S. Constitution for two reasons. First, they contend that the requested information is material to their defense that their actions were justified under the First and Second Amendments. They claim that they possessed firearms in self-defense because they feared that law enforcement would use excessive force to end their armed occupation of the MNWR. (Defs.' Mot. 2). Second, they contend that the information is discoverable to show bias by law enforcement and government witnesses.

Defendants' Motion to Compel should be denied without a hearing because none of what they seek is relevant to the charges or any legally viable defense.

II. Legal Argument

Rule 16(a)(1)(E) provides:

> **(E) Documents and Objects.** Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
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> **(i)** the item is material to preparing the defense;
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> **(ii)** the government intends to use the item in its case-in-chief at trial; or
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> **(iii)** the item was obtained from or belongs to the defendant.

The term "materiality" under Rule 16 is broader than Brady materiality. *United States v. Muniz-Jaquez*, 718 F.3d 1180, 1183 (9th Cir. 2013). It includes information "relevant to developing a possible defense," *id.*, or information that "would have helped" a defendant prepare a defense. *United States v. Hernandez-Meza*, 720 F.3d 760, 768-69 (9th Cir. 2013).

Rule 16(a)(1)(E) is limited to materials that are relevant to the defendant's response to the government's case-in-chief and does not require production of materials relating to claims challenging the prosecution's conduct of the case in general. *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996) (Rule 16 does not permit discovery of materials related to claim of selective prosecution). Although the government interprets materiality broadly, as the law requires, defendants nevertheless bear the initial burden of satisfying this Court that the documents they demand are actually relevant, in some permissible way, to preparing their defense. Defendants fail to meet even this minimal threshold. *Muniz-Jaquez*, 718 F.3d at 1183.

Here, defendants seek to compel production of information related to the government's response to their armed takeover and occupation of the MNWR. The requested information includes records regarding planning for defendants' arrests, rules of engagement for each law enforcement agency that responded to the occupation, the number and identities of every law enforcement officer present on each day of the occupation, the number of officers who wore body armor or tactical gear on each day of the occupation, the number and identities of snipers,

the total number and types of firearms and other weapons possessed or carried by law enforcement, the number and types of aircraft and vehicles used by law enforcement, the location of trauma units and information about planning for casualties, information about fortifying the Harney County Courthouse and the identities of all law enforcement officers stationed there, information about the closure and reopening of Harney County schools, information about FBI facilities at the Burns airport and the identities of all law enforcement stationed there, information about the activities of FBI SWAT and Hostage Rescue Team activities, information about informants and agents used to convey information about the use of force to the defendants, information about government efforts to portray the defendants as violent extremists, information about government efforts to harass citizens of Harney County, and records of daily briefings. (Defs.' Mot. 3-5).[1]

Although some of this information may be gleaned from reports already provided, the government is not aware of any prepared general accounting for items such as who happened to be wearing body armor on any particular day. Such investigative details have no bearing on the charge or any viable defense. The issue at trial will be whether there was an agreement by one or more people to impede officials from discharging duties of the United States and that each

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[1] As noted in defendants' Motion, some information that may be responsive to these requests has already been produced. Other information, including information regarding the government use of confidential sources will be disclosed as previously ordered by the Court. Specifically, the Court's June 17, 2016, Order (ECF No. 726) expressly addresses confidential sources and public statements by government agents.

defendant joined that agreement knowing of at least one of its objects and intending to help accomplish it.

A. The Evidence Sought Is Irrelevant to Self-Defense

Whether law enforcement responded to the armed takeover with 100 officers or 500 officers, and whether half or all or those officers wore body armor has no bearing on this case. First, to be entitled to a self-defense jury instruction, defendants must make a prima-facie case by offering evidence to show: (1) a reasonable belief that the use of force was necessary to defend themselves against the immediate use of unlawful force; and (2) the use of no more force than was reasonably necessary in the circumstances. *United States v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006). Defendants arrived at the refuge office armed; there is no suggestion that they secured firearms only after law enforcement responded to the scene. Defendants' argument is akin to a burglar claiming that he carried a firearm while robbing a house because he feared that the homeowner would react to finding the intruder with deadly force. And while defendants may claim that they feared law enforcement's observable response, they could not have feared what they did not know. Most critically, there was nothing unlawful about the law enforcement response, so the defense would necessarily falter for several reasons. In any event, details about the investigation are neither relevant to the defense nor likely to yield any relevant evidence.

The jury will not be asked to decide if law enforcement responded appropriately to the armed takeover of the MNWR. Instead, the jury will have to decide if defendants engaged in the charged conspiracy. Defendants are free to present evidence that they did not enter into an

agreement or that they formed an agreement that had only lawful purposes. Details regarding the law enforcement response to the occupation are not relevant to the defendants' response to the government's case-in-chief. Accordingly, the materials are not covered by Rule 16(a)(1)(E). *Armstrong*, 517 U.S. at 462-63.

B. The Evidence Sought Is Irrelevant to a 1st or 2nd Amendment Defense

Defendants cannot claim that the requested information is material to a First Amendment defense. The First Amendment protects the expression of ideas through printed or spoken words as well as nonverbal "activity . . . sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974) (statute unconstitutional as applied to defendant who displayed flag with peace sign to protest military action). However, the Supreme Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citation and internal quotation marks omitted); *see also Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) (observing that "[g]un possession can be speech where there is 'an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it.'").

Assuming without conceding that this is a legally viable defense, defendants fail to proffer any coherent explanation for how details about the investigation or staffing strategies has any bearing on defendants' intent to engage in protected expressive activity.

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Defendants' Second Amendment pitch is creative but fares no better. They rely on *District of Columbia v. Heller*, 554 U.S. 570 (2008), to support an argument that there is a separate, special "second amendment" self-defense that eliminates the usual legal elements required to sustain that defense. *Heller* did no such thing. Instead, the Court held that a complete ban on handgun possession in the home violated the Second Amendment. The Court noted, however, that "the right secured by the Second Amendment is not unlimited" and that it "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. In reaching its decision, the Court emphasized that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27. The Court called such restrictions "presumptively lawful." *Id.* at 627 n. 26.

Again, even if this were a viable legal theory, defendants fail to explain how, for example, the FBI's operational plan would have any bearing on the defense. Even if the Court permitted the defense to present this theory to the jury, the relevant issue would be what defendants knew, not how the government responded (particularly when the defendants were unaware of those actions).

The existing discovery and materials readily available to defendants provide ample evidence to demonstrate that after defendants took over the MNWR, law enforcement officers responded to the occupation and did so equipped with firearms and other law enforcement

equipment necessary to confront the heavily armed occupation. Accordingly, whatever merits defendants' theory may have, the requested information is not material to the defense.

C. Defendants' Case Authority Does Not Support Their Motion

Defendants' reliance on *United States v. Stever*, 603 F.3d 747 (9th Cir. 2010), is misplaced. Stever was charged with manufacturing marijuana on his property, and he sought information from the government regarding Mexican DTOs who may have been surreptitiously growing marijuana in the area. On appeal, the court held that the information sought was relevant under Rule 16 to Stever's defense that someone else was responsible for the marijuana grow found on his property. Thus, if the government actually had evidence that Mexican DTOs were operating near defendant's farm around the time his grow was located, it could exculpate Stever. As a consequence, the government had to turn over any responsive evidence.

By contrast, the items defendants seek with this motion do not (and could not) lead to evidence that someone other than these defendants committed this crime. Identity is not an issue. Instead, the primary issue at trial will center on defendants' intent, and nothing in the requested discovery is responsive to that inquiry. *See also United States v. Poindexter*, 727 F. Supp. 1470, 1474-75 (D.D.C. 1989) (granting discovery request when items sought could negate the defendant's specific intent to conspire to destroy documents and lie to Congress about the program).

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D. Some of What Defendants Seek Does Not Exist

Defendants claim that the fact that "the records are within the government's control "should be beyond dispute." (Defs.' Mem. 7). The prosecutors have asked the FBI to determine if any such documents exist and will update defendants as more information is developed. However, at this point it seems likely that documents that inventory individuals and equipment responding to the occupation on a daily basis with the details requested by the defense do not exist. To respond to defendants' request, the government would likely have to compile and summarize information from multiple sources. That would be extraordinarily burdensome and goes well beyond the government's discovery obligations.

E. None of the Requested Information Would Show Bias

Witness bias is generally admissible, even though it is not expressly covered by the Rules of Evidence. *United States v. Abel*, 469 U.S. 45, 50-51 (1984). But staffing and programmatic decisions made by law enforcement in response to the takeover are not evidence of bias. Instead, bias describes the "relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *Id.* at 52; *see also United States v. Hankey*, 203 F.3d 1160, 1171 (9th Cir. 2000) (recognizing bias as evidence that a witness may have a "special motive to lie" because of an interest in the outcome or personal animus).

Defendants fail to explain how the requested materials could show bias on the part of law enforcement. Even if every member of a team wore body armor on a given day, that fact

neither reveals that any potential government witness favors one side over the other, nor does it evince any personal animosity.

If the Court determines that the requested materials are discoverable, the government asks that the Court review the materials and deny or restrict dissemination under Rule 16(d). The detailed manner in which law enforcement responded to the occupation could raise significant security issues in a future armed conflict. Pursuant to Rule 16(d)(1), the government will seek to file an ex parte affidavit outlining these concerns.

III. Conclusion

For the reasons set forth above, Defendants' Motion to Compel Production of Information Regarding Law Enforcement's Use and Display of Force should be denied without a hearing.

Dated this 20th day of June 2016.

Respectfully submitted,

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